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No. 82-452

In the Supreme Court of the United States

OCTOBER TERM, 1982

UNITED STATES OF AMERICA, PETITIONER

v.

JOHN VON NEUMANN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

REPLY BRIEF FOR THE UNITED STATES

REX E. LEE
Solicitor General
Department of Justice
Washington, D.C. 20530
(202) 633-2217

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In our petition for a writ of certiorari, we presented three questions for review, *viz.*,: whether the statutory provision permitting a claimant to request remission or mitigation of penalties for violations of customs laws creates a property interest subject to any requirements of due process; whether delay in disposing of a petition can be held to violate due process without any inquiry into the reasons for the government's delay or any finding that the delay somehow prejudiced the claimant; and whether a 24-hour deadline for deciding remission petitions when the property seized is an automobile is constitutionally required. In opposing our petition, respondent has made several assertions that warrant a brief reply.

1. Respondent argues (Br. in Opp. 8) that, notwithstanding the existence of statutory procedures for civil forfeitures that contain no such requirement, there is a due process

right to a hearing within 24 hours after the seizure of an automobile to determine the propriety of the seizure and the existence of mitigating circumstances; he suggests that the court of appeals merely used the remission process as "the means for the holding of such hearings * * *" (*ibid.*). With regard to the asserted right to a mitigation hearing, respondent's claim is frivolous. This is tantamount to saying that 19 U.S.C. 1618, which grants the Secretary of the Treasury authority to remit or mitigate a forfeiture in his discretion, is constitutionally required. This is plainly wrong. Just as there is no general right to a parole system or a pardon system, see *Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex*, 442 U.S. 1, 11 (1979); *Connecticut Board of Pardons* v. *Dumschat*, 452 U.S. 458 (1981), so there is no constitutional right to remission or mitigation of a forfeiture. Nor, in light of the discretionary nature of Section 1618, does it provide any interest protectable under the Due Process Clause. It thus follows that there is no right to an administrative remission or mitigation hearing within any particular period of time.

With regard to the asserted right to a hearing on the validity of the seizure, that issue is not properly posed in this case because respondent did not in his remission petition contest the validity of the seizure of his car.[1] Nor could there be any real dispute on the point; the vehicle was unquestionably subject to seizure as soon as respondent brought it

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[1]Respondent did not challenge the legality of the seizure on the day he entered the country. His only claim was that he lacked intent to avoid the Customs duty because he was actually looking for the Canadian Customs building. The court of appeals, however, properly held that this claim was irrelevant to his duty to declare the automobile when requested to make a declaration. Thus, although respondent subsequently argued in the courts below that the seizure was invalid, that claim was first raised by respondent three weeks after the seizure and was easily rejected by both the district court and the court of appeals (Pet. App. 6a-7a, 22a).

across the border and failed to declare it for purposes of paying the customs duty on it. Moreover, if one in respondent's circumstances did believe that a Customs seizure was invalid, a remedy is provided by means of a motion under Fed. R. Crim. P. 41(e) for return of seized property, which would permit a prompt judicial determination whether the seizure was lawful.[2] The remission process is therefore not constitutionally required for that kind of a determination.[3]

In addition, the process Congress adopted for resolving disputes about the forfeitability of property is a judicial hearing (19 U.S.C. 1604), not an administrative one. That process clearly satisfies the Constitution. In *United States* v. *Thirty-Seven Photographs*, 402 U.S. 363, 373-374 (1971), this Court held that a 14-day delay prior to instituting a judicial action to forfeit allegedly obscene material was constitutionally permissible. The time limit was this brief only because First Amendment interests were implicated. The Court did not require an administrative probable cause determination to precede the formal forfeiture action. It

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[2]In addition, we note that with regard to the propriety of the seizure, the claimant's possessory interest is significantly protected against arbitrary interference because the seizing agent is a government official acting pursuant to plain statutory authority, who has no self interest in seizing property not subject to forfeiture. See *Calero-Toledo* v. *Pearson Yacht Leasing Co.*, 416 U.S. 663, 679 (1974). This, of course, distinguishes this case from *Fuentes* v. *Shevin*, 407 U.S. 67 (1972), relied upon by the court of appeals.

[3]Congress did not include the validity of the seizure as an issue in the mitigation process (19 U.S.C. 1618). Remission and mitigation assume that forfeiture is proper and merely provide discretionary relief in cases where the violation is due to negligence or where there are some other equitable considerations that indicate that forfeiture is unduly harsh. Thus, assuming that a constitutional right to a post-seizure hearing existed, it still would be improper simply to convert the remission process, created by Congress to serve a substantially different purpose, into the constitutionally required hearing into the legality of the seizure.

cannot be that due process requires a more prompt administrative hearing after the lawful seizure of a car than the hearing that is required after the seizure of material potentially protected by the First Amendment.

2. Respondent also argues (Br. in Opp. 11) that in light of the importance of his interest in having his car and the relatively light burden on the government to justify the seizure, he was greatly "prejudiced" by the failure of the government to provide a hearing within 24 hours. Respondent does not deny, however, that the seizure was perfectly valid and thus that he had no right to possession of his car. Moreover, he has acknowledged that he was permitted to get the car back as soon as he posted a bond.[4]

With regard to prejudice to respondent from Customs' failure to dispose of his petition within 24 hours, it is worth noting that although respondent now argues that the agents at the checkpoint did not give him an adequate opportunity to declare his automobile, respondent made no such claim on the day of the seizure. He simply indicated that he lacked intent to avoid paying customs duties and was, in fact, attempting to locate the Canadian customs office.[5] It was not until 24 days after the seizure, when respondent filed

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[4]Respondent complains (Br. in Opp. 14) that it is inappropriate to characterize his conduct as "smuggling." But he does not deny that he committed a plain violation of customs law by failing to declare the car (and he has admitted that he was well aware of that requirement). Thus, regardless of how we describe what respondent has done, forfeiture of the car was still fully appropriate. Accordingly, his immediate possessory interest was properly extinguished, and, as we argued in our petition, the inconvenience of being at the border without a car stems solely from respondent's indiscretion and not from the remission and mitigation process.

[5]Of course, respondent did not mention that he was lost when he was asked by the agent whether he had purchased anything outside of the country or had anything to declare.

his supplemental petition for remission, that he made any claim regarding the conduct of the agents. Thus, delay has done little more than provide respondent with additional time in which to decide what issues to raise. In addition, respondent does not deny that the agents could not possibly have investigated his petition within 24 hours and made any reasonable evaluation of his intent in crossing the border.

3. Respondent argues (Br. in Opp. 9-10) that this case is distinguishable from *United States* v. *Eight Thousand Eight Hundred Fifty Dollars ($8,850) in United States Currency*, cert. granted, No. 81-1062 (Mar. 22, 1982) (hereafter *$8,850*), largely on the basis that he was not criminally prosecuted. This distinction is immaterial. In neither case is there any basis for challenging the government's right to forfeit the property; the common issue is whether the Constitution bars forfeiture solely because of delay. Accordingly, the Court may wish to hold this petition pending disposition of *$8,850*.

Frankly, however, we agree with respondent that the two cases can be distinguished; unlike respondent, our submission is that the difference makes this case worthy of summary reversal. Subsequent to the decision of the court of appeals in this case, the Ninth Circuit, citing this decision, has expanded its holding by concluding generally that "[d]ue process requires the government to act promptly in ruling on petitions for remission or mitigation • • •." *United States* v. *Forty-Seven Thousand Nine Hundred Eighty Dollars ($47,980) in Canadian Currency*, No. 81-3415 (Oct. 6, 1982), slip op. 4732. See also *United States* v. *Two Hundred Ninety-Five Ivory Carvings*, No. 81-3260 (Oct. 6, 1982), slip op. 4725. Thus, contrary to respondent's claim (Br. in Opp. 15), the decision in this case is not limited in its effect to the specific situation in which an automobile is seized in a remote location, but instead is being applied, with somewhat less stringent time requirements, to all forfeiture cases.

Even limiting the decision to car seizure cases, we demonstrated in our petition that it is simply impossible in many instances, of which this was one, to make a reasoned decision regarding remission or mitigation within 24 hours. Accordingly, many petitions will have to be denied (perhaps rather arbitrarily), with a corresponding increase in the number of forfeiture cases burdening the dockets of the federal courts. Since a large proportion of all forfeiture cases arise in the Ninth Circuit, this decision and its progeny will greatly disrupt the government's effort to deal reasonably with a substantial number of cases. Accordingly, immediate relief from the effect of this clearly unwarranted holding is both necessary and appropriate.

Respondent attempts to minimize the consequences of the decision below by suggesting (Br. in Opp. 14) that claimants can waive their rights if no decision can be reached within 24 hours, thereby allowing more time for completion of the mitigation process. It is somewhat strange for respondent now to suggest that the right of forfeiture could have been protected by obtaining a waiver when he never indicated the slightest interest in an expeditious disposition of his petition and did not even provide a complete presentation of his claim for remission or mitigation until more than three weeks after the seizure. It was only after the government declined to allow complete remission of the forfeiture—by which time his car had long since been returned to him—that delay became significant to him.[6] Moreover, the theory behind the waiver suggestion

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[6]Respondent's lament (Br. in Opp. 10, 11) that he never had a hearing on his claim until three years after the seizure and that eight years have elapsed without a final decision in his case is totally misleading. Respondent could have received a judicial forfeiture decree, probably within six months, if he had not agreed to accept the $20,900 in mitigation offered by Customs 35 days after the seizure. Thus, the delays are

completely undermines respondent's claim that he had a substantial interest in the seized vehicle. Respondent posits (Br. in Opp. 15) that it is "unlikely that a person faced with the prospect of a forfeiture proceeding * * * would not agree to waive further delays in order to allow the mitigation proceeding to proceed further * * *." This is simply a recognition that most claimants in these cases, like respondent, have no realistic prospect of reacquiring possession of their property at a forfeiture hearing, and that their only hope is that the government in the exercise of its discretion will see fit to release all or part of the value of the property seized. But nothing in the statute or the Constitution *requires* the government to grant this relief on any particular set of facts, and thus, a fortiori, nothing requires the government to grant or deny it within 24 hours. *Connecticut Board of Pardons* v. *Dumschat, supra; Greenholtz* v. *Inmates of the Nebraska Penal and Correctional Complex, supra*. The decision of the court of appeals to the contrary is plainly wrong.

CONCLUSION

For these reasons and the reasons stated in the petition, the petition for a writ of certiorari should be granted.

Respectfully submitted.

REX E. LEE
Solicitor General

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largely attributable to respondent's desire to take advantage of the numerous procedural options made available to him. It should be noted that during these "delays" respondent has had full use of his car since February 3, 1975, and has had all but $3,600 returned to him since at least April 1975.